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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JOSEPH ROBINSON, APPELLANT,
v.
WILLIAM A. CALDWELL. } No. 162.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

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JOSEPH ROBINSON, APPELLANT,
v.
WILLIAM A. CALDWELL. } No. 162.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF FOR THE APPELLANT.

QUESTION OF JURISDICTION.

This suit was brought in the State court of Idaho. The complaint was as follows:

> The plaintiff complains of the defendant and alleges:
>
> I. That one William Craig was a native-born citizen of the United States; that he was born in Greenbrier County, in the State of Virginia, in the year 1807; that on the 6th day of July, 1838, the said William Craig intermarried with Isabel Craig,

an Indian woman, and belonging to the Nez Perce tribe of Indians; that the said William Craig and his wife, Isabel Craig, on the 15th day of September, 1846, located and settled upon the following-described tract of land:

Beginning at a stake 30 yards north of Lapwai Creek, thence west 2 miles to a pile of rocks, thence south a half mile to a stake, thence east 2 miles to a cottonwood tree, thence north half a mile to the place of beginning, containing 640 acres, which said tract of land was a part of the public domain of the United States, lying in the Indian country in the then Territory of Oregon, but now in the State of Idaho, and included within the bounds of the present Nez Perce Indian Reservation.

II. That the said William Craig and his wife, Isabel Craig, continued to reside upon, occupy, and cultivate the said tract of land from the said 15th day of September, 1846, until the 4th day of June, 1855, when the said William Craig, his wife then being alive and residing with him upon the said tract of land, filed his notification to the register and receiver of the land office of the then Washington Territory, situated at Olympia, for the settlement of the said land, which had not yet been surveyed, in the following words and figures, to wit:

Pursuant to the act of Congress, approved on the 14th day of February, 1853, entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and make donations to the settlers of the public lands,'" and amendments thereto, I, William Craig of Wallawalla County, in the Territory of Washington, hereby give notice of my claim to donation of six hundred and forty acres of land, particularly bounded and described

as follows: Beginning at a stake thirty yards north of Lapwai Creek, thence west two miles to a pile of rocks, thence south half a mile to a stake, thence east two miles to a cottonwood tree, thence north half a mile to a place of beginning. (Signed) "William Craig," and filed the same in the office of the register and receiver of the said land office June 19th, 1855.

III. That the said William Craig and his wife, Isabel Craig, continued to reside upon and cultivate the said land and to perform all the requirements and provisions of the said act of Congress as aforesaid; and that prior to his death, which occurred in the year 1869, the said William Craig and his wife fully complied with the provisions of said act of Congress, and they were informed by the officers of the land office of said Washington Territory that they had fulfilled all requirements of the said act, and that there was nothing further for them to do in the premises to protect their title to the said land.

IV. And the plaintiff further alleges that in a treaty made between the Government of the United States and the Nez Perce Indians on June 11, 1855, as will more fully appear in 12 Statutes of the United States, page 957, by article 10 of said treaty, it was agreed, in consideration of the said Craig having uniformly shown himself a friend to the Nez Perce Indians, "that the tract of land now occupied by William Craig, and described in his notice to the register and receiver of the land office of the Territory of Washington on the 4th day of June last, shall not be considered a part of the reservation provided for in this treaty, except that it shall be subject, in common with the lands of the reservation, to the operation of the intercourse act."

V. And the plaintiff further shows that by his compliance with all the provisions of the said stat-

utes hereinbefore referred to and by the terms of the said treaty with the said Indians the said William Craig and Isabel Craig acquired and perfected their title to the said tract of land hereinbefore set out and described.

VI. And the plaintiff further shows that the said William Craig and Isabel Craig, who are now dead, after acquiring title to the said land and before their said death, by a proper deed of conveyance in fee simple, on February 13, 1869, conveyed all their right, title, and interest in and to the said land to one Samuel Phinney and Moses H. Rice, said Phinney having intermarried with a daughter of the said William Craig and Isabel Craig, the issue of their said marriage, and subsequently the said Rice conveyed his interest therein to said Phinney; and the plaintiff further shows that the said Samuel Phinney, under said conveyance, went into the possession of and continued to occupy and cultivate the said land until the 9th day of March, 1891, when the said Samuel Phinney, by a proper deed of conveyance, conveyed all his right, title, and interest to an undivided one-half interest in the said tract of land to William A. Caldwell, who is the plaintiff in this action. And the plaintiff further shows that on the said 9th day of March, 1891, in common with the said Samuel Phinney, he went into possession of the said tract of land, and has, with the said Phinney, continued ever since to occupy, cultivate, and use the same.

VII. The plaintiff further alleges that on the 30th day of September, 1893, the defendant, Joseph Robinson, who claims to have control over the said land and to an interest therein, notified the plaintiff that he must remove from said land, together with his family, and the said defendant threatened plaintiff

that unless plaintiff removes from said land on or before the 1st day of November, 1893, together with his family and effects, that he will come upon said land with force and arms and eject and drive off the plaintiff from the said land and premises.

VIII. That the said defendant without any right or title claims the control and possession of the said lands and premises, and this plaintiff shows to the court that unless the said defendant is restrained by an order of the court he will proceed to execute his said threat to eject said plaintiff from said land by force, and with the help of armed men as aforesaid.

IX. That the plaintiff has growing upon said land a large crop of grain, amounting to several hundred acres, and garden vegetables, and he has cattle and stock upon said land and premises, and has built his home thereupon, and it is his homestead and residence, and that if the plaintiff is allowed to come upon his said land and execute his threats, that he will tear down his fences, destroy his grain, and drive the plaintiff from his home, and his said crop and his said improvements will be a total loss to the plaintiff. That the defendant is insolvent and unable to respond in damages, and that the plaintiff is without any adequate remedy at all to prevent the said grievance and wrong threatened against him by the said defendant, and is entirely remediless without the equitable interposition of this honorable court; and if the defendant is permitted to go on and execute his threat—destroy his crop and his inclosures, scatter his stock, as hereinbefore alleged, and drive plaintiff from his home and residence—that plaintiff will suffer great and irreparable injury.

X. That the plaintiff is the owner of an undivided half interest in said tract of land mentioned and described in the first paragraph of this complaint, as

the grantee of said Samuel Phinney, and as tenant in common with the said Phinney is entitled to the possession thereof.

Wherefore the plaintiff prays judgment for an order restraining the said defendant by injunction from interfering with plaintiff in the possession or enjoyment of said land and premises, and restraining him from ejecting and driving plaintiff therefrom by force, as hereinbefore mentioned, and that on the final hearing of this cause the said injunction may be made perpetual, and that defendant and all others may be forever enjoined from interfering with the possession and enjoyment of said land and premises by the plaintiffs, and that the title and possession to the same may be quieted and confirmed in the plaintiff, and for such other and further relief as is just and equitable. (Rec., pp. 1–3.)

The case was removed to the United States circuit court upon the application of the defendant, the petition setting out that the suit arose under the Constitution and laws of the United States and treaties thereunder, in this, to wit:

The land described in this complaint is the same land referred to in article 10 of the treaty proclaimed by the President of the United States April 29, 1859, between the United States of America and the Nez Perce Indians, which said land was afterwards included in and made a part of the Nez Perce Indian Reservation in Idaho, by the provisions of the treaty proclaimed August 13, 1868 (15 Stat. L., p. 693); that your petitioner is, and at the time of the commencement of the suit herein was, the United States Indian agent for said Nez Perce Indians in Idaho, and as said Indian agent claimed to exercise authority upon the land described in the complaint and in

> no other way; that the plaintiff herein claimed title to said land as shown in the complaint herein, by and under a certain claim to donation under the provision of the act of Congress approved February 14, 1853, entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of public lands in Oregon, and to provide for the survey and make donations to the settlers of the public lands,'" and amendments thereto, and also under the tenth article of the aforesaid treaty proclaimed as aforesaid, April 29, 1859. (Rec., p. 9.)

While the complainant in stating his case shows that his title is derived under the laws and treaties of the United States, nevertheless it does not appear from the complaint that the suit is one arising under the laws of the United States. From all that appears in the complaint the defense might have been rested on something entirely independent of the laws and treaties of the United States, and the defendant might have claimed under a title deraigned from the same title set up by the complainant. It does not follow from anything set out in the complaint that the suit is one in which "some title, right, privilege, or immunity on which the recovery depends would be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction."

The parties stipulated that the cause "should be *heard upon its merits* upon the statement of facts stipulated and agreed on by and between the respective parties." (Rec., p. 31.)

It is respectfully suggested to the court that this case is controlled by the cases of *Tennessee* v. *Union and*

Planters' Bank (152 U. S., 454) and *Chappell* v. *Waterworth* (155 U. S., 102), and that the parties could not confer jurisdiction by agreement.

It was said in the former case that if the facts giving jurisdiction did not appear in the complaint, then the court "upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit" (p. 461).

When the case was decided adversely to the Government in the circuit court two appeals were taken, one directly to this court, which is the case now under consideration, and another to the circuit court of appeals.

The case was tried in the circuit court of appeals and the judgment of the circuit court was affirmed, the opinion appearing in 67 F. R., 391.

If the case was removable the appeal was properly taken to this court, for there was drawn in question the construction of a treaty made by the United States. (Act approved March 3, 1891, 1 R. S. Supp., 903.) The appeal to the circuit court of appeals was improperly taken and its judgment was a nullity.

Inasmuch as the court may hold that the case was properly removed, the argument upon the merits of the case made by James H. Forney, United States attorney for the district of Idaho, in the circuit court of appeals, which fully presents the case of the Government, is herewith submitted as a part of this brief, as follows:

STATEMENT.

This is an action in equity brought by the appellee to perpetually enjoin the appellant from ejecting or driving the appellee from certain lands included in the Nez Perce

Indian Reservation, in the State of Idaho, the appellant being the duly appointed and acting United States Indian agent of the Nez Perce Indians in said State.

The action was commenced in the district court of the second judicial district of the State of Idaho in and for Nez Perces County, and was, upon the petition of the appellant, removed into the circuit court of the United States for the district of Idaho. At the time of the commencement of the action a temporary restraining order was issued by the said court enjoining the said appellant from ejecting appellee from the lands described in the bill of complaint. The case was tried in the circuit court before the Hon. James H. Beatty, judge, upon a statement of facts agreed upon between the parties and filed in the action. The facts as so agreed upon are substantially as follows:

That one William Craig was a native-born citizen of the United States, born in the year 1807; that on the 6th day of July, 1838, the said William Craig intermarried with Isabel Craig, an Indian woman belonging to the Nez Perce tribe of Indians; that said William Craig and his wife Isabel, on the 15th day of September, 1846, located and settled upon the lands hereinafter described in the notification, which said tract of land was a part of the public domain of the United States, lying in the Indian country in the then Territory of Idaho, and included within the bounds of the present Nez Perce Indian Reservation; that the said William Craig and his wife continued to reside upon, occupy, and cultivate the said tract of land from the 15th day of

September, 1846, until the 4th day of June, 1855, when the said William Craig (his wife then being alive and residing with him upon the same tract of land) filed his notification to the register and receiver of the land office of the then Washington Territory, situated at Olympia, for the settlement of said land, which had not yet been surveyed, which notification is in words and figures as follows:

> Pursuant to the act of Congress approved on the 14th day of February, 1853, entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of public lands in Oregon, and to provide for the survey and make donations to the settlers of the public lands,'" and amendments thereto, I, William Craig, of Wallawalla County, in the Territory of Washington, hereby give notice of my claim to donation of 640 acres of land particularly bounded and described as follows: "Beginning at a stake 30 yards north of Lapwai Creek, thence west 2 miles to a pile of rocks; thence south half a mile to a stake; thence east 2 miles to a cottonwood tree; thence north half a mile to place of beginning." Signed, William Craig.

And filed the same in the office of the register and receiver of the said land office June 19, 1855. (Rec., pp. 25, 26.)

And that said William Craig and his wife Isabel Craig continued to reside upon and cultivate said land from the 15th day of September, 1846, until his death in the year 1869.

That on the said 19th day of June, 1855, the said William Craig filed in said land office with said notifica-

tion his own affidavit and the affidavits of Henri M. Chase, William C. McKay, and Louis Rabion, copies of which appear on pages 32 and 33 of the transcript.

That after the making of the said proof the said William Craig and wife received a letter from the officers of the land office at Olympia, Wash., notifying said Craig that his filing and proof were complete, and that he had as complete a title to said land as could be acquired prior to issuing a patent; that patent could not issue until the Government survey had been extended over the country.

That in the treaty between the United States and the Nez Perce Indians, of June 11, 1855 (12 Stats., p. 957), in article 10, the following mention was made of said Craig's claim:

> That the tract of land now occupied by him [William Craig] and described in his notice to the register and receiver of the land office of the Territory of Washington, on the 4th day of June *last*, shall not be considered a part of the reservation provided for in this treaty, except that it shall be subject in common with the lands of the reservation to the operation of the intercourse act.

That in the year 1870 one D. P. Thompson, while engaged in making and extending the first surveys of the Government from township 35 north, range 3 west, B. M., in which is included the land in controversy, at the request of one Joseph K. Vincent, who was the tenant of the heirs of William Craig and Samuel Phinney, made a survey of the said claim of William Craig, and was paid therefor by said Joseph K. Vincent. That a plat was made of this survey and kept on file in the office of the Indian agent at Lapwai, Idaho.

That in the month of October, 1887, in reply to a letter written by R. J. Monroe, attorney for said Samuel Phinney and said William Craig's heirs, the Commissioner of the General Land Office notified the said Monroe that the proof of said William Craig, copies of which are hereinbefore set out in this stipulation, was deficient, for the reason that said proof was not accompanied by the affidavit required by section 12 of the said donation act, approved September 27, 1850, and that no certificate of the surveyor-general or the register and receiver of the local land office appears to have been made, setting forth the facts in the case and specifying the land to which the party is entitled, as is prescribed by the seventh section of said donation act.

That on the receipt of this letter the said Samuel Phinney, through his attorney, on December 20, 1890, made application to the surveyor-general of Idaho for an order of survey of said land. That on March 14, 1891, said surveyor-general replied that he had no authority to issue said order for the reason that said lands were included in the lands of the Nez Perce Indian Reservation. That upon the receipt of this letter from the surveyor-general the attorney for said Samuel Phinney and William Craig's heirs applied to the honorable Commissioner of the General Land Office for a patent, inclosing said plat and plats of the survey made by the said D. P. Thompson in 1870, said plat being Exhibit A (Transcript, between pp. 52 and 53), and accompanied by the affidavit of Joseph J. Vincent (Transcript, p. 42). That the honorable Commissioner of the Land Office

refused to issue the patent, on the ground that the treaty provisions of the 11th of June, 1855, conferred no title or authority to issue title to William Craig and wife, but simply granted a right of occupancy as long as the Indians' title to the reservation remained unextinguished, and that Congress, in the preamble to the act approved March 3, 1873 (17 Stats., p. 627), construed the right of William Craig as a personal right to occupy the land, and that his right ceased with his death, and that no affidavit seems to have been made by William Craig, as required by the twelfth section of the act of September 27, 1850 (9 Stats., 496), and that no certificate of the surveyor-general or receiver and register appears to have been made setting forth the facts in the case as required by the seventh section of said act, and for the further reason that the said land was not subject to donation entry when Craig made his settlement, because the Indian title had not then been extinguished.

That the defendant, Joseph Robinson, now is, and since prior to the 1st day of September, 1893, has been, the qualified and acting United States Indian agent of the Nez Perce Indians in Idaho, and that he assumed all exercise, control, and authority over the land described in the complaint herein as such Indian agent. That the land described in the complaint is the same land referred to in article 10 of the treaty made June 11, 1855, between the United States and the Nez Perce Indians.

That the land ever since the execution of said treaty has been included within the exterior boundaries of the said Indian reservation. That said Indian agent ordered

the said plaintiff to remove from said land as Indian agent aforesaid, acting under and by direction of the Commissioner of Indian Affairs and the Secretary of the Interior.

That on the 14th day of March, 1890, the surveyor-general of Idaho, acting under orders from the Commissioner of the General Land Office at Washington, refused to survey said claim as a donation claim, on the ground that the said land was, at the time of the application therefor, included in and a part of the Nez Perce Reservation.

That the land described in the complaint, to-wit, the undivided one-half interest in said donation claim, now is, and at the time of the commencement of the suit herein was, of the value of over $2,000, exclusive of interest and costs.

That the said William Craig and Isabel Craig are now dead, and that on February 13, 1869, they conveyed all their right, title, and interest in and to the said land to one Samuel Phinney and Moses H. Rice, and subsequently the said Rice conveyed his interest thereto to said Phinney, and that said Phinney under the said conveyance went into the possession of and continued to occupy and cultivate the said land until the 9th day of March, 1891, when the said Phinney, by a proper deed of conveyance, conveyed all his right, title, and interest to an undivided one-half interest in the said tract to W. A. Caldwell, complainant in this action.

That on the 9th day of March, 1891, in common with the said Samuel Phinney, he went into possession of

the said tract of land, and has with the said Phinney continued ever since to occupy, cultivate, and use the same.

That on the 29th day of January, 1894, upon the foregoing facts, the court rendered a decree, adjudging the appellee to be the true and lawful owner of the undivided one-half interest in the premises and quieting his title thereto, and making the temporary injunction perpetual. (See Transcript, pp. 37, 38.)

The appellant assigns the following errors, which he relies upon for a reversal of said decree and for a dismissal of the complainant's bill, viz:

ASSIGNMENT OF ERRORS.

First. The court erred in holding and decreeing that the land in controversy was subject to location and settlement at the date of the alleged entry thereof by the said William Craig.

Second. The court erred in holding and decreeing that the provisions of the original donation act (sec. 12, 9 Stat. L., p. 499), and amendments thereto, were applicable to this tract of land.

Third. The court erred in holding and decreeing that the said William Craig complied with the provisions of the original donation act (sec. 12, 9 Stat. L., p. 499) and amendments thereto.

Fourth. The court erred in holding and decreeing that the alleged location and entry of the said William Craig vested in said Craig such a right prior to his full

compliance with the provisions of the law as estopped Congress from making any other use or appropriation of the land in controversy.

Fifth. The court erred in holding and decreeing that the defendant, an officer of the Government, was properly subject to being sued.

Sixth. The court erred in not dismissing the bill of complaint.

ARGUMENT.

I.

We will consider the first and second assignments of error together. The appellee claims title under the provisions of the act of Congress approved September 27, 1850, commonly known as the Oregon donation act. (9 Stat., 496.)

The fourth section of that act provides:

> "That there shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of his intention to become a citizen, * * * and who shall have resided upon and cultivated the same for four consecutive years, *and shall otherwise conform to the provisions of this act*, the quantity of one-half section" for a single man, and for a married man one section, "one-half to himself and the other half to his wife, to be held by her in her own right, and the surveyor-general shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office; and in

all cases where such married persons *have complied with the provisions of this act so as to entitle them to the grant as above provided,* * * * and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon."

Section 6 of the act, among other things, provides:

> *That within three months after the survey has been made,* * * * each of said settlers shall notify the surveyor-general * * * of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form, and where it is practicable so to do the land claimed shall be taken as nearly as practicable by legal subdivisions.

Section 7, among other things, provides that within twelve months after the survey has been made—

> Each person claiming a donation right under this act shall prove to the satisfaction of the surveyor-general or of such other officer as may be appointed by law for that purpose that the settlement and cultivation required by this act has been commenced, specifying the time of commencement, and at any time after the expiration of four years from the date of such settlement * * * shall prove in like manner by two disinterested witnesses the fact of continued residence and cultivation required by the fourth section of this act, and upon such proof being made the surveyor-general or other officer appointed by law for that purpose shall issue certificates under such rules and regulations as may be prescribed by

> the Commissioner of the General Land Office, setting forth the facts in the case and specifying the land to which the parties are entitled, and the said surveyor-general shall return the proof so taken to the office of the Commissioner of the General Land Office, and if said Commissioner shall find no valid objection thereto, patent shall issue for the land according to the certificates aforesaid upon the surrender thereof.

From the foregoing provisions of the act we think three things are clear, viz:

First. That no title under the act could be obtained until after the land is surveyed by the Government.

Second. That until the surveys have been made the settler is a mere squatter upon the public lands, without any right as against the Government.

Third. That the Government was under no legal obligation to survey the land; in other words, the settler, under the act, must wait for the action of the Government in making surveys exactly the same as a preemption or homestead settler upon unsurveyed land, and that in the meantime the settler has only an inchoate right to be preferred to any other settler, but not a right as against the Government itself.

The land in controversy has never yet been surveyed. There never has been a time when Mr. Craig, or those claiming under him, could legally file any notification or proofs with the surveyor-general, or any other officer. The proofs he did file were premature, entirely unauthorized and nugatory, and the description as given in his proofs is void for uncertainty. The point of commencement is at a stake "30 yards north of Lapwai

Creek." Is this point near the mouth of the creek or near the head of the creek? Suppose the creek to be 15 or 20 miles in length, how can the land be found and identified?

Again, this land is included within the bounds of the present Nez Perce Indian Reservation. It is so alleged in the plaintiff's bill (Transcript, p. 1), and it is stipulated in the statement of facts that said land ever since the execution of said treaty of June 11, 1855, has been included within the exterior boundaries of said Indian reservation. (Transcript, p. 30.)

Said lands are now included within the bounds of the present Nez Perce Indian Reservation. (Transcript, pp. 25, 26.)

This treaty of June 11, 1855, was ratified by the Senate March 8, 1859, and proclaimed by the President April 29, 1859. (12 Stat. L., 957.)

By that treaty the Indians relinquished their title to all lands excepting a portion especially reserved for them, and the land in controversy was within the part so reserved. Hence the same was, up to April 29, 1859, a part of the Indian country mentioned in the intercourse act of June 30, 1834. (4 Stats., p. 729.)

This land was occupied by the Indians up to April 29, 1859, and was purely Indian country under the act of 1834 as construed and settled by the Supreme Court. (*Ex parte* Crow Dog, 109 U. S., p. 561.)

In this case Mr. Justice Matthews quotes from the case of *Bates* v. *Clark* (95 U. S., 204), as follows:

> It follows from this that all the country described by the act of 1834 as Indian country remains Indian

> country so long as the Indians retain their original title to the soil and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.

And then he says:

> In our opinion, that definition now (1883) applies to all the country to which the Indian title has not been extinguished within the limits of the United States, *even when not within* a reservation, expressly set apart for the exclusive occupancy of the Indians.

In other words, this land "*belonged*" to the Indians, and the Government paid them $200,000 for their relinquishment. If it belonged to the Indians, then settlement upon it was prohibited by the provisions of said intercourse act. (4 Stat., 729.)

Section 11 of that act provides that if any person shall make a settlement on any lands belonging to any Indian tribe, or shall survey or attempt to survey any such lands or designate any of the boundaries, etc., such offender shall forfeit and pay the sum of $1,000, etc. It has long ago been held by the Supreme Court that the Indians are acknowledged to have the unquestionable right to the lands they occupy until it shall be extinguished by a voluntary cession to the Government. (*Cherokee Nation* v. *Georgia*, 5 Pet., p. 1.)

And this rule has since been affirmed and emphasized and this right of the Indians declared to be "*as sacred as the title of the United States to the fee.*" (*United States* v. *Cook*, 19 Wall., 591; *Railroad Company* v. *United States*, 92 U. S., p. 733.)

In the latter case the court says:

> As long ago as *The Cherokee Nation* v. *Georgia* (5 Pet., 1) this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy until it shall be extinguished by a voluntary cession to the Government; and recently, in *United States* v. *Cook* (19 Wall., 591), that right was declared to be as sacred as the title of the United States to the fee. Unless the Indians were deprived of the power of alienation it is easy to see that they could not peaceably enjoy their possessions with a dominant race constantly pressing on their frontier. With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion if the Government discharged its duty to them. This it has indicated a willingness to do, for in 1834 an act was passed (4 Stat. 729, sec. 11) prohibiting, under heavy penalties, a settlement on the lands of an Indian tribe, or even an attempt to survey them. This perpetual right of occupancy, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company, either absolutely or *cum onere*.

How, then, could Mr. Craig prior to April 29, 1859, make any legal settlement or legally mark any claim upon these lands? In this connection we cite the court to the pertinent language of Chief Justice Waite in the case of *Belk* v. *Meagher* (104 U. S., p. 284), where he says:

> *As in this case all these things were done when the law did not allow it, they are as if they had never been done.*

It is true that by section 10 of the above treaty with the Nez Perce Indians (12 Stats., p. 960) the tract of land in controversy, although within the boundaries of the tract ceded to the Indians, was not to be considered a part of the reservation provided for in the treaty, yet by the same section it was provided that "*it shall be subject in common with the lands of the reservation to the operation of the intercourse act.*"

This provision, as stated in the act, was put into the act because of the desire of the Indians *that he should continue to reside with them, he having been their friend.*

It could amount to no more than a mere license to Mr. Craig *personally* to reside there; although the land was not to be considered a part of the reservation it was not a part of the land ceded by the Indians to the Government. It was subject to the operation of the intercourse act as much so as any part of the reservation ceded to the Indians. If this is so, how could any other person settle upon or acquire rights upon it? It was a personal privilege or license to Mr. Craig. It was not and, in the very nature of things, could not be transferable, and any other person settling thereon or attempting to settle or attempting to mark the boundaries thereof would be liable to the penalties prescribed by the eleventh section of the intercourse act.

This treaty of April 29, 1859, was afterwards amended by treaty of June 9, 1863, proclaimed April 20, 1867 (14 Stats., p. 647), and new boundaries fixed for the reservation. These boundaries include the land now in controversy. Article 2 of this treaty reserves as a home

and for the sole use and occupation of said tribe the tract of land described therein, and by the same article it has provided that all the land within the described boundaries shall be surveyed and marked out for the exclusive use and benefit of the said tribe as an Indian reservation, and then follows the following provision:

> *Nor shall any white man, excepting those in the employ of the Indian Department, be permitted to reside upon said reservation without permission of the tribe and the superintendent and the agent.*

[In *Frisbie* v. *Whitney* (9 Wall., 187), which has been repeatedly affirmed, the court said:

> It will hardly be contended that anything short of a vested right in this land could deprive Congress of the right which it has as owner and holder of the legal title, and, by the express language of the Constitution, to dispose of and make all needful rules and regulations respecting the territory or other property of the United States (p. 192).

In the same case (p. 195) the court quotes with approval as follows:

> It is not to be doubted that settlement of the public lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and has paid the requisite purchase money.

In the *Yosemite Valley Case* (15 Wall., 87) the court said, speaking of the Frisbie Case:

> And it was there held that under the preemption laws mere occupation and improvement of any por-

tion of the public lands of the United States, with a view to preemption, do not confer upon the settler any right in the land occupied *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived.

In the same case (p. 88) the court said:

> The decision in *Frisbie* v. *Whitney* was pronounced by a unanimous court, and subsequent reflection has satisfied us of its entire soundness. The construction there given to the preemption laws is, as there stated, in accordance with the construction uniformly given by that Department of the Government to which the administration of the land laws is confided, and by the chief law officers of the Government to whom that Department has applied for advice on the subject. It is the only construction which preserves a wise control in the Government over the public lands and prevents a general spoliation of them under the pretense of intended settlement and preemption. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste, in the destruction

> of timber or removal of ores, which he might think proper to commit during his occupation of the premises.

Both of these cases were cited with approval in *Campbell* v. *Wade* (132 U. S., 38), the court saying:

> Until all the preliminary steps prescribed by law for the acquisition of the property were complied with the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price.

In *Whitney* v. *Taylor* (158 U. S., 85, 95) this court, speaking through Mr. Justice Brewer, said:

> By neither the declaratory statement in a preemption case nor the original entry in a homestead case is any vested right acquired as against the Government. For each fees must be paid by the applicant, and each practically amounts to nothing more than a declaration of intention.]

This was the condition of affairs at the time of the attempted sale and conveyance by Craig and wife to Samuel H. Phinney and Moses H. Rice, February 13, 1869, and at the time of the deed to the plaintiff. These parties received these conveyances charged with full knowledge of all the laws and public treaties, and having done so they have no equities of any kind; in fact they are naked trespassers upon the reservation, nor can the respondent lawfully reside upon the reservation, without the permission of the tribe and the superintendent and the agent.

By the stipulation of facts herein the appellant, being the Indian agent and acting under the authority and

direction of the Commissioner of Indian Affairs and the Secretary of the Interior, has ordered the respondent to be removed from the reservation and by the injunction issued in this case, made permanent by the decree herein, he is prohibited from so doing.

II.

The third and fourth assignments of errors may be considered together.

The learned judge of the court below, in his opinion deciding the case (at page 58 of the Transcript), says: "The granting clause in the donation act, while not granting *in presenti*, borders closely on it." But we submit that in his decision, taken as a whole, he has applied to the case the rules applicable to present grants and not the rules applicable to grants *in futuro*.

In the case of *Hall* v. *Russell* (101 U. S., p. 509), in construing this donation act in question here, Chief Justice Waite says:

> There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law and actually in existence at the time. * * * In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named.

> Coming, then, to the present case we find that the grantee designated was any qualified "settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years and shall otherwise conform to the provisions of the act."
>
> The grant was not to a settler only, but to a settler who had completed the four years' residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees.

And then again, at page 512, he says:

> We conclude, therefore, that under section 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation and performing such other acts in the meantime as the statute requires in order to protect his claim and keep it alive.

If we understand this decision correctly it holds that a settler acquires no interest in the land which can be sold or demised, or that will even descend to his heirs, until he has completed all the various things required by the act to be done by him. He must reside upon and cultivate for four consecutive years. He must within three months after the survey is made, or if the survey has previously been made, then within three months after settlement, notify the surveyor-general of the precise tract or tracts

claimed by him; he must within twelve months after the survey has been made, or within twelve months after settlement where the survey has been previously made, *prove to the satisfaction of the surveyor-general, etc.*, that the settlement and cultivation required by this act have been commenced, specifying the time of the commencement; and he must also at any time after the expiration of four years from the date of settlement prove in like manner by two disinterested witnesses the fact of continued residence and cultivation. And upon such proof being made the surveyor-general, etc., shall issue certificates under such rules and regulations as may be prescribed by the Commissioner of the General Land Office, setting forth the facts in the case and specifying the land to which the parties are entitled.

In the case of *Stark* v. *Starrs* (6 Wallace, 413), Mr. Justice Field, in speaking of the time when the right to a donation claim became perfected, says:

> That right became perfected when the certificate of the surveyor-general and accompanying proofs were received by the Commissioner of the General Land Office, and he found no valid objection to them. That is to say, if the donation act of 1850 was applicable to the lands, his right to a patent became perfect when the certificate of the surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements.

When these provisions of the act are complied with, and not before, according to the last decisions cited, the rights of the settler are complete. None of these acts except the settlement could have been legally done until after the Government had surveyed the land.

There is nothing in the case of *Dolph* v. *Barney* (97 U. S., p. 652), cited and relied upon by the court below, in conflict with the above decision. In the Dolph Case the settler had occupied and cultivated the four years, had filed all notices and made the proofs, which had been accepted and the requisite certificate issued, and nothing remained to be done except the issuance of the patent. Only the dry, legal title remained in the Government. Upon this statement of facts the court very properly held that he had a title which he had a right to convey.

Again, the decision of the court below seems to have been based upon the theory that the officers of the Government had in some way failed in their duty, or, in other words, that Craig had in some manner been forestalled by the officers. (Transcript, pp. 55, 56.)

Wherein does the record show such action? The land was in Indian country, and known to be so by Mr. Craig, for he had married and lived among them. No surveys have ever been made by the Government until the Indian title is extinguished. Was that the fault of any officer of the Land Department? No proper description was or could be filed until after the survey, and therefore the register and receiver of the Olympia land office had nothing to act upon. How could they accept his proof and issue the certificate to lands in the Indian country without any survey, and with no other description than the one in the notice Craig filed? It was void for uncertainty.

By the seventh section of the donation act the settler was required within twelve months after the surveys had

been made, or where the surveys had been made before the settlement, then within twelve months from the time the settlement was commenced, to prove to the satisfaction of the surveyor-general or such other officer, etc., that the settlement and cultivation required by this act had been commenced, specifying the time of the commencement. This was never done. The first papers filed were upon October 19, 1855, and even if we discovered the necessity of a survey, the donation claim would be fatally defective for the want of this proof.

III.

The fifth and sixth assignments of error may be considered together.

We admit that under some circumstances where an officer of the Government threatens to do an act which, under any view that could be taken of the facts laid before him, is beyond the scope of his authority, which act will do an irreparable injury to another, an injunction may be granted enjoining him from doing that act. This is the rule laid down by the United States Supreme Court in the well-considered case of *Noble* v. *Union River Logging Company* (147 U. S., pp. 171, 172). Under this decision the question for the court to determine is not that under one view that can be taken of the facts laid before the officer he would be acting beyond the scope of his authority. The facts laid before the officer and upon which he must act must be such that *under any view which may be taken of them* he will still be acting *ultra vires*. We think it will be conceded that

if the land in question is a part of the Nez Perce Reservation, then the respondent would have no right to remain thereon without the permission of the Indian superintendent and agent, and the agent, the superintendent, or Commissioner of Indian Affairs would have the right to remove him; and on the other hand we concede that if the land was not a part of the reservation, but was without question the property of the respondent, then none of these parties would have any right to disturb him.

Bearing in mind now that an officer will not be enjoined if, under any view of the facts, the officer would be justified in acting, we will again briefly go over those facts.

In 1855, forty-one years ago, Craig attempted to initiate a claim to the land under the donation act. The land at that time was in the Indian country and settlement thereon prohibited. The land was unsurveyed and has never yet been legally surveyed, so as to be entered under the donation act. In 1855 the land was included within the boundaries of the Nez Perce Reservation by treaty promulgated April 29, 1859. This treaty, however, declared that the land should not be considered as a part of the reservation, but that it should be subject to the provisions of the intercourse act; this concession being inserted in the treaty because Craig was a friend of the Indians and they desired him to remain with them. In 1863 the land was again by a treaty with the Indians included within the new boundaries of the reservation; all of which was to be surveyed and set apart as a home for the tribe, and in this treaty no

exception was made of the Craig claim. In 1869 Craig died, still residing on the land. There is a total absence in the record of any evidence showing or tending to show that from 1855 until his death Craig ever did anything toward asserting or acquiring title under the donation act. In 1873 Congress (17 Stats., 627) authorized the Commissioner of Indian Affairs to purchase the improvements from the legal representatives of William Craig. The surveyor-general had refused, under the advice of the Secretary of the Interior, to cause the tract to be surveyed at the request of the grantees of Craig, placing his refusal upon the ground, among others, that no claim under the donation law had ever been initiated by Craig upon the land, and upon the further ground that the land was a part of the Nez Perce Indian Reservation.

The Commissioner of the General Land Office had refused to allow an entry to be made, putting his refusal upon the same grounds and upon the further ground that if Craig ever had any claim under the donation law he had abandoned it. The appellee's rights were acquired by and through quitclaim deeds. He was a stranger to the Indians, and it is to be presumed that the appellant had some good reason for the removal of appellee. He was also directed to remove him by the honorable Commissioner of Indian Affairs. Even Congress, the highest authority in the land, had treated this claim as a nullity.

How, then, under all this array of facts, can it be said that under no view of the facts was the officer justified in the removal of the appellee?

We confidently claim that if the appellee was an obnoxious person, then under no view of the facts could the officer refuse to remove him. If this be so, then no court of equity could or should interfere by injunction, either temporary or permanent. The defendant is a public officer charged with the care of the Indians, performing duties both executive and ministerial. He has the welfare of the Indians in his keeping. It is of the highest importance both to the public as well as to the Indians that he, under the direction of the superintendent and Commissioner of Indian Affairs, should have the exclusive control of the Indians and of the lands set apart for them for a permanent home. His motives in doing the act threatened have not been questioned, and we confidently maintain that in such a case a court of equity should be slow to interfere. We earnestly believe that when the case is fully considered it will be found to be without merit, and that the decree entered ought to be and will be reversed, and the bill ordered to be dismissed.

J. M. DICKINSON,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

JOSEPH ROBINSON

vs.

WILLIAM CALDWELL.

No. 162.

Appeal from the United States Circuit Court for the District of Idaho.

BRIEF FOR APPELLEE.

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Statement of the Case.

Prior to the treaty of June 15, 1846, with Great Britain, the Territory of Oregon, including what now constitutes the States of Oregon, Washington and Idaho, was, by treaties of 1818 and 1827, with Great Britain "open and free to the citizens of both powers." While in this condition the people of Oregon, in 1845, organized a provisional government, by the terms of which any resident of the Territory was allowed a land claim of 640 acres.

By said treaty of June 15, 1846, with Great Britain (9 Stat., 869) the territory in question became the property of the United States, and on August 14, 1848, Congress passed an act "to establish the Territorial Government of Oregon" (9 Stat., 323), by which the laws of the provisional government were revoked.

On June 27, 1850, an act was passed by Congress (9 Stat., 496) commonly known as the Oregon "Donation Act," by which there was granted to every white settler or occupant of the public lands, upon the conditions therein specified, "if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one-half to himself and the other half to his wife, to be holden by her in her own right." There is a proviso to this section that "all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefore, shall be void."

Section 7 of said act provides "That within twelve months after the survey has been made, or when the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfaction of the Surveyor General, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section

of this act; and upon such proof being made, the Surveyor General, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the Commissioner of the General Land Office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said Surveyor General shall return the proof so taken to the office of the Commissioner of the General Land Office, and if the said Commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof."

On February 14, 1853, Congress passed an act (10 Stat., 158) amendatory of the above-mentioned "Donation Act," by the 6th section of which it was provided "That every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said Territory on or prior to the first day of December, eighteen hundred and fifty, shall be and hereby is required to file with the Surveyor General of said Territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing setting forth his claim to the benefits of said section, and citing all required particulars in reference to such settlement claim, and all persons failing to give such notice on or prior to the first day of December, eighteen hundred and fifty three, shall be thereafter debarred from ever receiving any benefit under said fourth section."

On July 17, 1854, a further act was passed (10 Stat., 305) amendatory of the "Donation Act," section two of which provides "That the provisions of the fourth section of the act of twenty-seventh September, eighteen hundred and fifty, above mentioned, by which all contracts for the sale of lands claimed under that law, before the issue of patents therefor, are declared void, shall be and the same is hereby repealed." Section three of this act further provides, "That the time limited by the sixth section of the act of eighteen hundred and fifty-

three, in which claimants under the act of eighteen hundred and fifty are required to give notice of their claims shall be, and the same is hereby extended to the first day of December, eighteen hundred and fifty-five."

On the 15th day of December, 1846, two years before the organization of the Territory of Oregon, one William Craig, a native-born citizen of the United States, and at said date the husband of a Nez Perce woman, settled upon the land in controversy in this suit, which is fully described on page 1 of the Record, and which fell within the boundaries of the Territory (now State) of Idaho, under the organic act of March 3, 1863 (12 Stat., 808).

On June 4, 1855 (Record, p. 26), and within the time limited by the act of 1854, Craig gave the notice required, and at the same time made the proof required by section four of the act of 1850, including his citizenship, marriage, continuous settlement, cultivation, etc., which proof was filed with the Register and Receiver of the Land Office at Olympia, Washington Territory, who, by law, had succeeded the Surveyor General, and who notified Craig of the receipt of his proof, and that it was sufficient and satisfactory, but that no certificate would be issued (as required by section seven of the original act) until after the public surveys had been extended over the land. (Record, pp. 31, 32, 33, 34 and 48.)

On June 11, 1855, the United States entered into a treaty with the Nez Perce tribe of Indians (12 Stat., 957), by which said Indians relinquished and ceded to the United States any claim they may have had to the country occupied by them. By article 2 a reservation was created, which is therein definitely described, from a part of the ceded district, for their joint occupancy with other tribes. By the 10th article of this treaty

it was provided that the tract of land occupied by Craig (the land in question) and which fell within the exterior limits of the reservation so as above created, should form no part of such reservation, thus leaving it in the same situation as the other lands ceded, the Indian title being extinguished, but subject to the intercourse laws. Said section 10 reads—

"The Nez Perce Indians having expressed in Council a desire that William Craig should continue to live with them, he having uniformly shown himself their friend, it is further agreed that the tract of land now occupied by him, and described in his notice to the Register and Receiver of the Land Office of the Territory of Washington, on the fourth day of June last, shall not be considered a part of the reservation provided for in this treaty, except that it shall be subject in common with the lands of the reservation to the operations of the Intercourse Act."

Craig and his wife continued to reside upon and cultivate the land and complied with all the provisions and requirements of the law up to the year 1869, in which year he died. Prior to his death said Craig and his wife, by proper deed of conveyance, on February 13, 1869, conveyed the land in question to Samuel Phinney (who had married their daughter) and Moses H. Rice. Subsequently said Rice conveyed his interest to Phinney, who continued to reside upon and cultivate the land and comply with all the provisions of the law until March 9, 1891, at which time he conveyed the undivided one-half of said land to William Caldwell, the appellee in this case. (Record, p. 2.)

In 1870 the United States surveys were extended over the lands including this claim, and a survey of the claim was made by the Government surveyor and a plat there-

of filed in the office of the United States Indian Agent at Lapwai. (Record, pp. 28, 29.)

In 1887 Phinney, requesting information from the Commissioner of the General Land Office as to the progress of his claim, was informed that the proof was deficient, for the reasons—

First. That said proof was not accompanied by the affidavit required by section 12 of the act of 1850.

Second. That no certificate had been issued as required by section 7 of said act.

Application was then made to the Surveyor General for survey of said claim, and for the certificate provided for in said section 7 of the act of 1850, above referred to, who, acting under instructions from the Commissioner of the General Land Office, refused to survey the claim for the alleged reason that the same was within the Nez Perce Indian reservation and not subject to entry.

The act of March 3, 1873 (17 Stat., 627), while authorizing the purchase of the improvements on the land in question, referred to Craig's right as a mere personal right of occupancy during his lifetime.

In September, 1893, Joseph Robinson, appellant, the then Indian Agent for the Nez Perce Indians, acting under instructions from the Commissioner of Indian Affairs, notified appellee to remove from the premises, under pain of forcible ejectment in case of refusal or neglect to do so. Thereupon, on October 20, 1893, Caldwell began a suit in the state court to restrain appellant from carrying out said threat. Before answer, appellant removed said cause to the United States Circuit Court for the Northern Division of the District of Idaho. After answer, trial was had upon an agreed statement of facts, as briefly set out above, and judgment rendered in favor of appellee, making said injunction perpetual.

From that decree the case is brought to this court.

It is unnecessary to go into further detail in the statement of the facts as the above fully present all that are essential in the consideration of the case.

It will be seen that the following questions are presented for determination.

First. Did Craig acquire a legal settlement by his location in 1846, or afterward?

Second. Was the land in question subject to the operation of the "Donation Act" of 1850?

Third. Did Craig or his grantees comply with the requirements of that act; if not, did he or they comply as far as permitted by the Government's officers and so far as to entitle him or them to a patent?

Fourth. Was there any legal restriction upon alienation at the date of mesne conveyances down to defendant in error?

For convenient reference we will restate the facts in the order of their occurrence.

1807, Craig born, Greenbrier, Co., Va.

1837, Craig married to Nez Perce woman.

1846, Craig and wife settle on land in question.

1848 (August 14), Territory of Oregon established.

1850 (June 27), Oregon "Donation Act" passed.

1853 (February 14), "Donation Act" amended, requiring those who settled prior to December, 1850, to file notice of claim in advance of survey.

1854 (July 17), "Donation Act" further amended by repeal of clauses forbidding alienation, and extending time for making proof to December 1, 1855.

1855 (June 4), Craig files notice as required above.

1855 (June 11), Nez Perce treaty concluded.

1869 (February 13), Craig and wife convey land to Phinney and Rice.

1869, Craig dies.

1870, Land surveyed and claim surveyed and platted.

1873 (March 3), Congress authorizes purchase of improvements on land in question.

1890, Phinney notified that proof is insufficient.

1890, Phinney applies to Surveyor General for certificate which is refused on ground that land is in Indian reservation.

Before discussing the merits of this case, as disclosed by the Record, we will briefly consider the question of jurisdiction, not raised in the bill of exceptions, but presented for the first time by appellant's counsel in his brief.

The petition for removal was filed by appellant (defendant below) in order to bring the case to a forum of his own choice. Having failed on the merits he now seeks to retrace his steps.

The questions of jurisdiction upon petition for removal to the Circuit Court, in cases not depending on the citizenship of the parties, have been so clearly stated by this court in recent decisions that to discuss them would be impertinent. That the original bill filed in the Idaho District Court must determine that question is of course admitted. What then does that bill disclose? It alleges, first, that Craig, grantor of appellee (plaintiff below) settled upon certain land in controversy, then being a part of the public domain, and within the Territory of Oregon, in 1846. Second, that on June 4, 1855, he filed with the Surveyor General his notification as required by the act of Congress of February 14, 1853. Third, that he and his wife continued to reside upon said land, and fulfilled all the requirements of said act of Congress. Fourth, that by the treaty between the United States and the Nez Perce Indians of June 11, 1855, the land in question was excepted from the reservation thereby created, and became no part thereof. Fifth, that by

compliance with the above acts, and by operation of said treaty, *he acquired title to said land.* Every affirmation of the bill rests upon a construction of a United States Statute or a treaty. His suit is exactly one, as disclosed by his bill, in which his "title, right, privilege or immunity * * * would be defeated by one construction of the constitution or a law or treaty of the United States, or sustained by a contrary construction."

It is impossible to conceive of a case coming more fully within this rule than the case at bar. It does not meet merely one of the requirements of the rule—it meets them all but one, and possibly that too. It calls for the construction of numerous statutes of the United States and a treaty of the United States. Every claim he puts forward is based squarely upon such a statute or treaty as shown by the bill, and by the construction put upon them he stands or falls. We fail to see what effect the theory that "the *defence* might have been rested on" can have upon the case. Appellee claims nothing except under the statutes and treaties of the United States. That the answer or other parts of the Record can be examined for jurisdictional questions is exactly what the rule directly denies. If something that the answer "might" contain is to deprive the federal court of jurisdiction, where the bill is ample to confer it, then jurisdiction could never be maintained.

If, notwithstanding the allegations of the bill, the Record as a whole should develop the fact that the material issues do not involve a federal question, then it might be that the removal could be held to have been improvidently taken; but such is not the case here, for while the bill, in every paragraph, discloses that it is a suit that might have been brought originally in the United States court, the answer is even more emphatic,

disclosing that the United States is itself the real party in interest.

But to proceed with the merits.

Craig and his wife had a perfect right to locate upon the land in question, at the date of his settlement in 1846. At that time the country in which the land in question is located, was, by the treaties with England of 1818 and 1827, "open and free to the citizens of both powers." When the Territory of Oregon was organized, in 1848, the land upon which he was residing was undoubtedly a part of the "country" or "hunting grounds" of the Nez Perce Indians, just as all the vast region of the west was the hunting ground or country of some one or other of the numerous tribes inhabiting it. But it has never been held or maintained, so far as the writer is aware, that this was the kind of "occupancy" by which white settlers were excluded from the land, or that any such occupancy ever became recognized except through the treaty-making power of the Government, declaring and setting apart, in some definite form, and by some convenient boundaries, the lands or country to be occupied by a given tribe or band, which thereby became "reserved" for its exclusive occupancy and use. The very phrase uniformely used in the treaties of "creating a reserve" or "reservation" implies that new and addded rights, privileges and protections are secured to them that they did not before possess.

The learned judge, who decided this case below, well says on this phase of the question, when referring to the "Intercourse Act" of 1834:

"Attention has been called to the Intercourse Act of June 30, 1834 (4 Stat., 729), defining the country west of the Mississippi River as 'Indian Country.' By sec-

tion 11 it prohibits all white persons from settling upon '*any lands belonging, secured or granted by treaty with the United States to any Indian tribe.*'

"It does not exclude other lands from such settlement, but on the contrary the reservation of certain lands from settlement would imply authority to occupy those not so reserved; moreover, the act contemplates the residence of whites in the Indian country, for its chief object seems to be to so regulate their intercourse with the Indians as to prevent strife and disorder between the two races.

"The two cases (19 Wall., 591, and 92 U. S., 733) cited by the defendant's counsel are concerning lands *within Indian reservations*, and cannot be considered controlling in this case. The right of general occupancy to the public domain is quite different from that given the Indians when a special reservation is by law or treaty assigned to them. This the Government treats as something tangible, and of it they are never deprived until they relinquish their claim."

The very act upon which the claim of title in this case is based, the Donation Act of 1848, recognizes the validity of settlements made within this country prior to the organization of the Territory, and prior to any treaty with these Indians.

By section 4 of said Donation Act it was provided that—

"There shall be, and hereby is, granted 640 acres of land to married persons who shall comply with the provisions of this act so as to entitle them to the grant as above provided, *whether under the late provisional government or since*," and by section 7 that "At any time after the expiration of four years from the date of such settlement, *whether made under the laws of the late provisional government or not*, shall prove," etc.

If the contention of appellant's counsel is correct, then none of the country west of the Mississippi River could

have been occupied by a white man until that vague and uncertain something, called the Indians' "right of occupancy," had been extinguished to every tract, as presumably all parts of it have been at some time roamed over by some band or bands, and it might become a matter of no small difficulty to determine, in the absence of any treaty relation between the parties, just by what tribe or what band a particular district should be relinquished, as many hunting grounds were used in common, and in all cases the common frontiers were vague and illy defined, overlapping one another oftentimes for hundreds of miles. Beyond this it is a fact of common knowledge that millions upon multiplied millions of acres of public domain have been settled upon in the vast region west of the Mississippi, to which no Indian title was or ever has been since extinguished. Such construction would also make idle the provision of the eleventh article of the Intercourse Act, prohibiting settlement upon lands "belonging, secured or granted by treaty to any Indian tribe," etc. That the treaty-making power of the Government did not entertain any such construction as contended for is fully established by the language of the Donation Act already quoted, which recognizes the settlement made by white persons in Oregon prior to any Indian treaty. And still again, in 1853, when Congress passed its first amendment to the Donation Act, it provided that notices should be filed with the Surveyor General by all persons who were "resident in said Territory on or prior to the first day of December, eighteen hundred and fifty." How useless and meaningless would be these enactments if there were no legal settlements there till after the treaty of 1855, by which the Indian title was extinguished. In fact the whole act would have been without force, for no Indian title had been extinguished at the date of the

Donation Act, and under the contention of appellant's counsel no one could avail himself of it and it would donate nothing.

Then if Craig's settlement was lawful, his rights having vested, it could not be included within a reservation to the Nez Perce Indians without his consent, or possibly condemnation, if legal grounds for it existed. But even if it could have been, it was not. By the Nez Perce treaty the Indians first ceded to the Government all their lands. That cession extinguished the Indian title, if any existed. They did not cede all *except* the reservation afterwards described, but they ceded *everything*, and afterwards a reservation was created for them within the ceded country, but from this reservation the land occupied by Craig was excluded, leaving it in the condition of the other ceded lands, although surrounded by the exterior lines of the reservation, and for purposes of better control, subject to the intercourse laws, which was in nowise incompatible with Craig's ownership of the land. It would be difficult to frame a clause more comprehensive and clear in its terms—"that the tract of land now occupied by him and described in his notice to the Register and Receiver * * * *shall not be considered a part of the reservation provided for in this treaty.*" It makes no difference how this clause is read, the result is always the same. If, as contended by appellant's counsel the reservation was excepted from the general session (which is not the fact) then the exception of the Craig tract from the reservation, would still make it a part of the ceded lands, as an exception from the exception.

As it seems to be admitted by the agreed facts, and is not disputed, that Craig's proof was in time and sufficient, and that his notice was in time and sufficient, we do not deem it necessary to consume time in discussing

either of these propositions, but will pass to the rejection of his proof by the General Land Office. As already stated his proof was rejected for two reasons, that the same was not accompanied by the affidavit required by section 12 of the Donation Act, or the certificate of the Surveyor General as required by section 7 of said act.

The first objection is so clearly erroneous that it is difficult to understand how the Land Office could fall into so singular an error. Section 12 reads—

"That all persons claiming land under any of the provisions of this act by virtue of settlement and cultivation commenced subsequent to the first of December, in the year eighteen hundred and fifty, shall first make affidavit," etc.

Thus referring only to those who settled subsequent to the taking effect of the act, while Craig claimed under a settlement four years prior thereto.

As to the second objection, claimant at once applied for an order of survey as a basis for the certificate, which the surveyor refused to make, under instructions from the General Land Office, for the reason, as already stated, that the land was within the Nez Perce reservation, which proposition we have already discussed. Claimant then did the only thing remaining that could be done —forwarded to the Land Office, the survey and plat made by the United States Surveyor in 1870, and asked for his patent, which was refused.

We will not discuss the familiar principle that when one party to a transaction has endeavored to perform everything devolving upon him to perform, and has been prevented by the other party the effect is just the same as if he had fully performed. When the claimant had done everything in his power, and all he was required by law to do to procure this certificate, the effect was exactly the same as if he had procured it.

This covers, we believe, all the questions raised in the bill of exceptions. Counsel for appellant state that three things appear from the statement of the case.

First. "That no title, under the act (Donation Act) could be obtained until after the land is surveyed by the Government.

Second. "That until the surveys have been made the settler is a mere squatter upon the public lands, without any right as against the Government.

Third. "That the Government was under no legal obligation to survey the land," etc.

He then proceeds to argue the three propositions, first stating that "the land in controversy has never been surveyed."

The first proposition may be true, in the sense that the title could not be *completed* till a survey was had, *provided*, the Government through its proper officers should not neglect or refuse to make such survey, in the ordinary and regular course of their official duty, when properly notified and requested so to do, and proper fees tendered. But that is not this case. As these three propositions are merely co-ordinate parts of a single proposition, we will treat them all together and not separately. The second and third propositions come very wide of the truth. If by "title" counsel means *evidence* of title it may be that the settler could not obtain it without a survey or until the Government should see fit to make such survey, *except* that the courts, in proper proceedings could complete such title where the officers of the Government, as in this case, neglect and refuse to do their duty. A settler upon these lands was *not* a mere squatter. The very act we are discussing declares he was not a mere squatter, but his rights to his settlement are distinctly and clearly recognized,

which by the performance of certain acts upon his part, which in this case were fully and completely performed, in so far as their performance was not prevented, were to ripen into a fee.

A large part of the Donation Act is devoted to the interests of those already upon lands in the Territory, and most of the amendments relate particularly to the preservation of their rights.

Section 4 of that act declares—

"There shall be, and hereby is, granted to every white settler or occupant of the public lands, American half-breed Indians included * * * now residing in said Territory, or who shall become a resident thereof," etc. Thus recognizing the rights and declaring the lawful status of all white settlers within the limits of the Territory, which was at the time unceded "Indian Country" under the general description contained in the Intercourse Act. We would suggest, in passing, that even if the Intercourse Act could bear the construction sought to be put upon it by counsel, it would be repealed by the later Donation Act, in so far as it should be found to conflict with the rights and privileges so clearly bestowed by the latter upon the white settlers in Oregon Territory.

If by the statement that "the land in controversy has never been surveyed," counsel means that the public surveys have never been extended over the lands including this tract, he makes a singular error, for the surveys were extended over the land in 1870, as shown by the Record (p. 28), an elaborate plat of which is attached thereto, marked Exhibit A. If it is meant that the Craig donation claim has never been surveyed, this is equally an error. The Record does not disclose what was required under the Oregon Donation Act to secure the survey of a claim, but it is presumable that the claim-

ant notified the Surveyor General and paid the fee, and it was the duty of that officer to make and preserve a plat and record of the survey. That the claimant did all that could be done on his part is abundantly apparent from the Record. He caused a survey and plat of the claim to be made by the Government surveyor, for which he paid the fee charged (Record, pp. 28–29), in 1870, which was a complete performance of the conditions of the statute so far as he could either perform or compel performance thereof, and any failure of complete fulfillment of the requirements of the act was the neglect and laches of the Government's officers. Having done this his title ripened as completely as if a patent had been executed and delivered to him.

This familiar doctrine has been no more clearly expressed than in Whitney *vs.* Morrow (112 U. S. 693), in which this court say :

"If by a legislative declaration a specific tract is confirmed to anyone, his title is not strengthend by a subsequent patent from the Government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries, would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress."

Counsel complains that the metes and bounds discription of the claim in question was indefinite and uncertain. This description is better than a majority of those found to-day in any of the original thirteen States of the Union. It is a parallelagram and nearly rectangular, and the courses and distances are clearly stated. Its location was, at the time of filing his notification and proof, and still is, widely known, and neither the wit-

nesses to his settlement and cultivation nor the United States surveyor who surveyed and platted it, seem to have experienced any difficulty in determining its exact location.

Even if this claim had not been surveyed and platted, and even if the description were more faulty than it is, it would be in nowise fatal to its validity. It is a matter of every day occurrence that imperfect descriptions require to be supplemented by the testimony of living witnesses. We hardly think this proposition deserves much consideration.

Counsel argue, at length that the treaty of 1855 only proposed to confer upon Craig the *personal privilege* of remaining upon the Nez Perce reservation during his lifetime, following the construction assumed by the Land Office in its letter refusing to issue a patent to Craig's heirs and grantees, which construction was also implied in the preamble to the act of March 3, 1873, authorizing the purchase of the improvements.

So far as this act of Congress is concerned, it cuts no figure in the case. The Indian Office, following the suggestion of the Land Office assumed that Craig was on an Indian reservation by sufference, and after his death asked authority to purchase the improvements made by him, which was granted in an item probably emanating from one of those offices, the preamble reciting that Craig had been granted the privilege of residence upon the reservation. Even if Congress had intended to construe the Nez Perce treaty of 1855 (which by no means follows from the language of this preamble), it would be wholly without force, Congress having no constitutional power to construe treaties, which, when ratified become "the supreme law of the land," whose interpretation is exclusively the function of the courts.

But these gentlemen might have saved themselves much labor by an examination of the treaty itself. In the 10th article, already so much quoted and referred to, and which is declared to confer only a personal privilege, it is provided that "the tract of land now occupied by him, *and described in his notice to the Register and Receiver* * * * on the fourth day of June last, shall not be considered a part of the reservation," etc. Thus the very language of the treaty-making parties, incorporated into the treaty itself, and ratified by Congress, refers for convenient description to the very instrument, only seven days before filed by Craig, setting up his claim, not to a "personal privilege" but to *title* to land under the Donation Act. This must forever set at rest all pretense that anybody, at the time, intended anything but that Craig's claim was to be recognized as a settlement under the Donation Act, and that it was excepted from the treaty reservation for the express purpose of enabling him to complete his title. Any other contention is too idle for serious discussion.

Nor could Craig's rights be disturbed by any later treaties referred to in appellant's brief, re-establishing the reservation boundaries, including this claim and making no exceptions in its favor. The Indian title never attached to it, to begin with, and if it had it would have been extinguished by the treaty of 1855, and it could not again become Indian land. Craig's rights became attached and vested, and could not afterwards be disturbed without his consent. The references to numerous cases involving the principles underlying the pre-emption law wholly fail to reach the case. This is so clearly stated in the opinion of the learned judge who decided the case below that it would be difficult to add to it. Under the pre-emption law the settler acquires no right save the preference right of purchase if, and when,

the Government shall choose to sell. No other rights and no powers vest in him. The Oregon Donation Act is a *grant*, while this court, in Hall *vs.* Russell (101 U. S., 503), has decided that it is not a grant *in praesenti*, the distinction is not altogether clear, especially in cases in which the grant is directly to a railroad or other corporation, and not to the state to aid in construction. At the time this grant was made there were many settlers on the public lands in Oregon, whose settlements had been made many years before, under authority of the provisional government, and who were in position to take title at once. True, the lands would have to be surveyed —so would they in case of a grant to a corporation; true, an entry or notification would have to be filed to fix with certainty the specific tract upon which the grant was to take effect, and so also would the map of definite location of the railway, for exactly the same purpose, etc. So, admitting, as we must, that this grant is not *in praesenti*, the analogies are so close that the distinction between it and a pre-emption right are as broad and clear as if it were. The opening clause of section 4 of the Donation Act is the set phrase of a present grant—"That there shall be and hereby is granted to every white settler," etc.

In the R. R. Co. *vs.* the United States (92 U. S. 741), this court say:

"'There be and is hereby granted' are words of absolute donation, and import a grant *in praesenti*. This court has held that they can have no other meaning * * *

They vest a present title in the State of Kansas, though a survey of the land and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." What essential is lacking in the case at bar? The moment Craig

filed his notification and proof the grant attached to the specific tract described, with all rights, powers and immunities as complete as if he were in possession of his patent, and no power, not even that of Congress could divest him.

The case of Exparte Crow Dog (109 U. S., 556) and Bates *vs.* Clark (95 U. S., 204), quoted by counsel, have reference solely to the police jurisdiction which the Government exercises over what is described in the Intercourse Act as the "Indian country," in order that trade and intercourse may be regulated and strife and lawlessness suppressed, and neither directly nor indirectly touches upon the question of title to the soil, nor in any way affects the issues in this case. It has never been contended that this jurisdiction does not rest in the United States.

Nor does this act, so much referred to and persistently discussed, have anything to do with this case. There is not a word in it relating to the question of title to or rights in the soil. It is simply "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier." It provides who may trade with the Indians and how, and fixes penalties for violations; provides for the appointment of traders and the conditions of such appointments, essentially for the purpose of suppressing the introduction of liquor. As trapping was then a favorite industry with the Indians, guarded with much jealousy, the act provides that, "if any person, other than an Indian, shall, *within the limits of any tribe with whom the United States shall have existing treaties*, hunt, trap, or take and destroy," etc. But this does not prohibit hunting or trapping elsewhere in this country, but on the other hand, implies the permission.

In the same way article 9 prohibits white men from ranging stock, horses, mules, etc., "on any land belong-

ing to an Indian or Indian tribe." The only reference in this whole act, as already stated, to the settlements by whites, is article 11, which prevents settlement upon "any lands belonging, secured or granted by treaty * * * to any Indian tribe," etc. It is too plain for argument, that this act does not attempt to even touch upon the question of title or rights in or to the soil, but simply to so regulate *intercourse* as to prevent outbreaks, bloodshed and turmoil, along the frontiers and between the Indians and whites lawfully settled and to be settled upon lands within the vast region termed "Indian Country," and the cases discussing this act have absolutely no relation whatever to the issues in this suit.

The case of the Railroad *vs.* U. S. (92 U. S., 733), cited at length in appellant's brief, is a case in which the lands of the Osage Indians, sought to be brought within the operation of the railroad grant, were *treaty* lands. We have never denied that a settlement within a treaty reservation would be unlawful. The very term "reservation" means that they are *reserved* from the public domain and from settlement, for a specific purpose. Counsel quotes extensively from this decision, but fails to quote the significant part that declares that when the right of possession of lands "is assured by treaty" to an Indian tribe, they are not subject to a subsequent grant. The cases referred to on this branch of the question sustain invariably the ruling of the court below, and the proposition for which we contend, for in all these cases, and in all the history of similar cases, without an exception, the grants *have taken effect upon all lands not embraced within a treaty reservation*, or otherwise disposed of or reserved.

In conclusion, counsel argues that no claim could be properly initiated until after survey, as "no proper description was or could be filed until after survey." And

again, "the land was unsurveyed and has never yet been legally surveyed so as to be entered under the Donation Act."

Where in the record counsel finds authority for this oft repeated declaration that the lands are unsurveyed, we are at a loss to discover. The agreed facts on which the case was tried distinctly show that the lands have been surveyed, and a copy of the plat of such survey is attached to the record, marked "Exhibit A." Yet if the lands had not been surveyed, the claimant's rights would in nowise be impaired thereby. Congress, by its amendment of February 14, 1853 (10 Stat., 158), to the Donation Act, expressly provided for settlers who, like Craig, were on their claims prior to the passage of that act, and directed what they should do to preserve their rights "in advance of the time when the public shall be extended over the land," etc. This was that they should file "a notice in writing," of necessity making such convenient description as was possible without a survey.

On July 17, 1854, by another amendment (10 Stat., 305), Congress extended the time of filing this notice to December 1, 1855. On June 4, 1855, six months before the expiration of the limit, Craig filed the required notice. At the same time he made his proofs. The most that can be said is that the proof was premature, as no survey had then been made, nor was it made till 1870. Had Craig waited through all these years, the witnesses to his settlement might, probably would have, died or gone beyond his reach for the purposes of such proof, or he might himself have died, as he did, just before the tardy surveys were extending over the lands, yet during all these years his claim would be ripe for proof, and all conditions existing upon which his full title depended. That the Government did not intend that settlers